No. 12,712

IN THE

United States Court of Appeals

For the Ninth Circuit

L. I. MACKLIN, et al.,
Appellants,

vs.

KAISER COMPANY, INC.,
Appellee.

Brief for Appellee

GORDON JOHNSON
111 Sutter Street
San Francisco 4, California
RICHARD DEVERS
1410 Yeon Building
Portland, Oregon
DARIO DE BENEDICTIS
111 Sutter Street
San Francisco 4, California
Attorneys for Appellee.

THELEN, MARRIN, JOHNSON & BRIDGES
111 Sutter Street
San Francisco 4, California

HART, SPENCER, MCCULLOCH,
ROCKWOOD & DAVIES
1410 Yeon Building
Portland, Oregon
Of Counsel for Appellee.

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO

SUBJECT INDEX

STATUTES AND RULES

OTHER AUTHORITIES

No. 12,712

IN THE

United States Court of Appeals

For the Ninth Circuit

L. I. MACKLIN, et al.,
Appellants,

vs.

KAISER COMPANY, INC.,
Appellee.

Brief for Appellee

INTRODUCTION—THE POSITION OF APPELLEE

A. The Stipulation for Judgment.

By the complaint and first supplemental complaint some 52 guards employed at the Swan Island Yard which Appellee operated for the United States Maritime Commission sought to recover overtime payments and liquidated damages under the Fair Labor Standards Act of 1938, 29 U.S.C.A., Section 201 et seq. Following the institution of the action on December 7, 1945, settlement negotiations were carried on by the attorneys for the parties, resulting in the execution of a Stipulation for Judgment (R. 22-27). This Stipulation for Judgment, accompanied by a proposed form of judgment (R. 27-29), was presented to the trial court on April 19, 1946 (R. 34). Thereafter, at the insist-

ence of the trial court (R. 35-36, 43, 45, 79, 91, 112), evidence was offered in support of the proposed settlement (R. 36-102).

Following an informal presentation thereof on December 20, 1946 (R. 126-129), in an opinion filed on December 23, 1946 (R. 110-125)[1] the trial court refused to enter a judgment pursuant to the stipulation. Three years later, by motion filed December 19, 1949 (R. 143-144), Appellants again requested the trial court to enter a judgment pursuant to the stipulation; but on July 31, 1950, the trial court denied this motion (R. 172).

We refer to these matters by way of introduction to a statement of Appellee's position with respect to the Stipulation for Judgment. Appellee has always taken the position that it entered into that stipulation in good faith and that it is prepared to carry out the terms of such stipulation if the condition thereof, namely, that a judgment be entered pursuant thereto, is accomplished. That such has been the position of Appellee is demonstrated by the following statement of Appellee's counsel in proceedings before the trial court on July 3, 1950, shortly before the acton was dismissed:

> "Mr. Devers: I might say, your Honor, for the record and for the Court's information also that the defendant entered into a stipulation, which is of record in the case, in good faith and the defendant is willing to abide by the stipulation and has no objection to the entry of judgment in accordance with the stipulation." (R. 171).

What happened in this case is this: because of the state of the law on the question, Appellee was unwilling to settle

[1]The opinion is reported in 69 F. Supp. 137.

the case in the usual way, by releases and a dismissal with prejudice. Instead, the settlement stipulation required, and was conditioned upon, the rendition of a judgment. The trial court, refusing to accept the role of a "rubber stamp" (R. 35), declined to render the judgment pursuant to the stipulation. Thus, the condition precedent to the accomplishment of the settlement has not been fulfilled. The issue here, therefore, is not whether Appellee has failed to keep its bargain; rather, the issue is whether the trial court was obligated, as Appellants contend, to enter a judgment pursuant to the stipulation of the parties.

The question is whether the trial court was stripped of its power to act as a judicial officer and its right to exercise sound judicial discretion merely because of the stipulation for judgment. In this state of the record, Appellee's duty to this Court is to point out why the trial court was justified in taking the position it did.

B. The Dismissal for Want of Prosecution.

With respect to the issue of want of prosecution, it should be noted that Appellee did not move for dismissal on that ground (R. 166). Again, however, we believe it to be the function of counsel for Appellee to call to this Court's attention the reasons which demonstrate that the action of the trial court in dismissing the case for want of prosecution was within the sound discretion of that court.

C. The Order of Presentation.

In the presentation of their points of appeal, Appellants have first presented the point that the trial court erred, on December 20, 1946 and on July 31, 1950, in refusing to enter judgment pursuant to the stipulation. They then discuss

the court's refusal to enter a summary judgment or to permit the filing of a supplemental complaint. Finally, Appellants contend that the trial court erred in dismissing the action for want of prosecution. While an orderly presentation of these points might indicate the advisability of our first discussing the dismissal for want of prosecution, the facts and circumstances involved in the other points afford a background for the lack of prosecution point and therefore we shall make our presentation in the same order as that adopted by Appellants.

STATEMENT OF BASIS OF ORIGINAL AND APPELLATE JURISDICTION

This is an appeal from an order of the United States District Court for the District of Oregon, dated and entered July 31, 1950,[2] dismissing[3] this action for want of prosecution (R. 176-185, 196). Notice of Appeal was filed on August 30, 1950 (R. 174-175).

The jurisdiction of the District Court over the complaint and the supplemental complaint, filed January 30, 1946, was invoked under the Fair Labor Standards Act (herein referred to as the F.L.S.A. and the Act), 29 U.S.C.A., Section 216(b) (R. 2-3, 10). The complaint cites Sections 24(1)

---

[2]Appellants describe the order merely as so dated and "filed September 29, 1950" (Brief p. 2). Their appeal would be premature were that also the date of entry. However, the Docket Entries disclose the order was *entered* July 31, 1950, and filed September 29, 1950 (R. 196). Fed. Rules Civ. Proc., Rules 58 and 79(a).

[3]Appellants describe the order as one "purporting to dismiss" the action (Brief p. 2). The order, of course, did dismiss the action and is an appealable order. *Compare* J. E. Haddock, Ltd. v. Pillsbury, 155 F.2d 820 (C.C.A. 9th 1946), cert. denied 329 U.S. 719 *with* Prickett v. Consolidated Liquidating Corp., 180 F.2d 8 (C.A. 9th 1950).

and (8) of the Judicial Code (28 U.S.C.A., Section 41; now 28 U.S.C.A., Section 1332), but contains no allegations supporting jurisdiction based on diversity of citizenship. On December 19, 1949, a second supplemental complaint was tendered, with a motion for leave to file the same, alleging jurisdiction to be based on Rule 15(d), Federal Rules of Civil Procedure; on Section 3(a) and (d) of the Portal-to-Portal Act of 1947 (29 U.S.C.A., Section 253(a) and (d)); and on diversity of citizenship (R. 157). As noted at pages 38, 39-40 of this brief, Appellee contends that the trial court was without jurisdiction over this proposed supplemental complaint.

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C.A., Sections 1291 and 1294.

STATEMENT OF THE CASE

The statement of the case contained at pages 2 to 11 of Appellants' brief is acceptable to Appellee, subject to the following comments:

1. At page 3 it is stated that Appellee offered testimony that written instructions had been issued requiring the guards to be present half-an-hour before their regular work began. While it is true that such evidence was offered, it should also be noted that it was qualified by the statement that in actual practice this requirement was never enforced, that roll call time gradually became later and later, and if a man was late he was not penalized (R. 40).

2. At pages 3 and 4 it is stated that Appellee stipulated that its operations were subject to the Act. While Appellee so stipulated, it should be further noted that the material question is whether the activities of Appellants were subject to the Act.

3. At page 6 it is stated that on January 21, 1948, a companion case, known as *Potter v. Kaiser Company, Inc.*, was dismissed and an appeal taken from the dismissal to this Court.[4] Then it is said that shortly after such dismissal the parties to the present case "agreed to suspend further proceedings until the *Potter* case was decided on appeal" and that this Court's mandate affirming the dismissal was not received until February 14, 1949. These facts are intended to explain a delay of approximately thirteen months, but it should be noted that the record does not disclose that the agreement of the parties with respect to such delay was called to the attention of the trial court at the time of the agreement. The first that the trial court knew of the arrangement was when it was referred to in an affidavit of Appellants' counsel filed on December 19, 1949 (R. 153, 156).

4. On page 9 Appellants refer to the proceedings before the trial court on January 3, 1950, at which, after Appellee's attorney had stated that Appellee did not request that the action be dismissed for want of prosecution, the trial court said:

> "I *think*[5] that in view of that situation the court will not dismiss the case on its own motion." (R. 166).

Then, at page 10, Appellants say that the question of dismissal for want of prosecution was "set at rest by his ruling of January 3 quoted above." It is obvious that the statement of the court was not a ruling, but simply the expression of a tentative and informal view.

---

[4]This Court's opinion of January 10, 1949, affirming the judgment of dismissal in the *Potter* case is reported in 171 F.2nd 705.

[5]In this brief, emphasis is ours unless otherwise indicated.

5. At page 11 Appellants state that, to the complete surprise of everyone concerned, the trial court on July 31, 1950, dismissed the action for want of prosecution. This reference to surprise is argumentative and not borne out by the record, which establishes that the possibility of a dismissal on the ground of want of prosecution was raised by the court as early as December 12, 1949 (R. 161-164).

6. Appellants refer to the proceedings of May 13, 1946, at which time the trial court raised the question as to whether a settlement of the present action was proper in view of the Supreme Court's decision in *D. A. Schulte, Inc. v. Gangi,* 328 U.S. 108 (1946). The impression is left that this decision was the principal factor troubling the trial court. However, the trial court's opinion of December 20, 1946 (R. 110-125) lists some eight major points (R. 116-117), which may be summarized as follows: (a) whether Appellee was engaged in the production of goods for commerce; (b) whether Appellants were so engaged, either directly or indirectly, when guarding the main installations of the shipyard; (c) whether Appellants were so engaged when guarding installations indirectly connected with ship construction; (d) whether Appellants should be entitled to compromise their claims, whether affecting coverage or not; (e) whether Appellee, when engaged in the production of ships under a cost-plus-fee contract with the Government, came within the purview of the F.L.S.A.; (f) whether the Maritime Commission could administratively adjudicate the rights asserted, agree to pay the same, and have a judicial decree entered enforcing the determination; (g) whether the United States could be rendered liable for overtime pay under the F.L.S.A.; and (h) whether the United States could be rendered liable, by stipulation or

judgment, for liquidated damages imposed on a private employer for failure to comply with the F.L.S.A. These issues are ably summarized and considered by the trial court in its opinion (R. 110-125). It was because of these issues and because of the other considerations stated in that opinion, rather than simply because of the Supreme Court decision in the *Schulte* case, that the trial court refused to enter judgment pursuant to the stipulation of the parties.

ARGUMENT

I. The District Court Did Not Err in Refusing to Enter Judgment Based Upon the Stipulation of the Parties for Entry of Judgment.

A. COURTS FAVOR THE TERMINATION BY SETTLEMENT OF LEGAL CONTROVERSIES BUT THEY DO NOT ABDICATE ALL JUDICIAL FUNCTIONS AT THE INSTANCE OF THE PARTIES.

1. The Rules Stated and Cases Cited by Appellants Support the Broad Doctrine That Courts Favor Settlements of Legal Controveries.

Appellants first cite the general rule, and some of its corollaries, that the compromise of a disputed claim supports an enforceable contract of settlement (Brief pp. 13-17). The rule is sound but not involved in this case.

Appellants next cite the general rule that stipulations of fact are binding on the court and obviate the requirement of proof thereof (Brief pp. 17-20). The rule is not a sweeping one: evidentiary facts may be stipulated, *Platt v. United States,* 163 F.2d 165 (C.C.A. 10th 1947), but not the legal conclusions drawn therefrom, *Swift & Co. v. Hocking Valley Ry.,* 243 U.S. 281, 289 (1917); *Hackfeld & Co. v. United States,* 197 U.S. 442, 446 (1905) (as quoted in Appellants' Brief, p. 18). A trial court may admit additional evidence proper for a full understanding of issues and for clarifica-

tion of terms used in the stipulation. *Southern California Freight Lines v. Davis,* 167 F.2d 708 (C.C.A. 9th 1948). This general rule cited by Appellants is not directly involved in this case.

Appellants then cite the general rule that "the parties to a pending case may stipulate to the entry of judgment and may agree upon any legal disposition of a case and it is then the *duty* of the court to enter judgment accordingly." (Brief pp. 20-24). With this rule we are here concerned.

Thus, no relevant issue is raised by pp. 12-20 of Appellants' Brief, for we do not quarrel with the general proposition that it is the policy of the law to encourage settlements, or with the rule that generally a settlement will be upheld even though the court believes that a different result would have been attained by a trial on the merits; and we do not challenge the rule, when properly limited, that stipulations of fact are normally binding on the court. But we do take issue, and strenuously so, with Appellants' assertion that a stipulation by the parties for entry of judgment imposes a *duty* on the court to act pursuant to the stipulation. We insist that the parties to an action cannot convert a trial judge from a judicial officer into a rubber stamp.

2. The Entry of a Judgment Pursuant to the Stipulation of the Parties Is a Judicial Function and Calls for the Exercise of Judicial Discretion.

It should be noted preliminarily that a consent decree is a judicial act. "It is a judicial function and an exercise of judicial power to render judgment on consent." *Pope v. United States,* 323 U.S. 1, 12 (1944). "A consent judgment is not a mere authentication or recording of an agreement between the parties * * *" *Urbino v. Porto Rico Ry.*

Light & Power Co., 68 F. Supp. 841, 842 (D.P.R. 1946), *affirmed,* 164 F.2d 12. A consent decree is not treated as a contract but as a judicial act. *United States v. Swift & Co.,* 286 U.S. 106 (1932); *Fleming v. Huebsch Laundry Corp.,* 159 F.2d 581 (C.C.A. 7th 1947).

Appellants contend that the court below had the power *and duty* to enter judgment as stipulated. They cite as error the court's insistence that a basis satisfactory to the court be established for the judgment as a condition precedent to its entry. They cite as error the court's refusal to enter the judgment despite the determination that this basis did not in fact exist.

Apparently Appellants were unaware then, and are still unaware now, that a court need not, and indeed will not, abdicate its functions as a court merely because the parties have stipulated for the entry of a judgment. *West v. Bank of Commerce & Trusts,* 167 F.2d 664, 666 (C.C.A. 4th 1948); *Hot Springs Coal Co. v. Miller,* 107 F.2d 677, 681 (C.C.A. 10th 1939); *Automobile Insurance Co. v. United States,* 10 F.R.D. 489 (D. Ore. 1950); *Rogan v. Essex County News Co., Inc.,* 65 F. Supp. 82 (D.N.J. 1946); *United States v. Radio Corporation of America,* 46 F. Supp. 654 (D. Del. 1942) (opinion by Maris, C. J.), *appeal dismissed,* 318 U.S. 796; *McLeod v. Hyman,* 272 Pa. 582, 586, 116 Atl. 535, 536 (1922); *Everett v. Cutler Mills,* 52 R.I. 330, 160 Atl. 924 (1932); Cf: *Kidd v. McMillan,* 21 Ala. 325 (1852) (Court not bound by stipulation to retry case after judgment); *Merrill v. Batchelder,* 123 Cal. 674, 56 Pac. 618 (1899) and *Everett v. Cutler Mills, supra* (stipulation for entry of judgment is merely evidence to be considered by trial court in rendering decision).

There are factors which a court will, even in an ordinary case, consider prior to rendering a consent decree. The consideration of certain of these factors may be discretionary, but that of others is mandatory. Hence the *duty* of the court is not to ignore them; on the contrary, it has the power and, under certain circumstances, the duty to require proof thereof. Thus:

(1) Fundamentally the court must have jurisdiction over the subject matter. This proposition hardly needs authority in support, but the same authority relied on by Appellants (Brief p. 20) states it as follows:

> "It is essential that * * * the subject matter be within the jurisdiction of the court. While the parties by their consent may confer jurisdiction over their persons, they cannot do this as to the subject matter."
> 3 Freeman on Judgments (5th Ed. 1925) p. 2772.

In *Walling v. Miller,* 138 F.2d 629, 631 (C.C.A. 8th 1943), *cert. denied,* 321 U.S. 784, the court said:

> "On the other hand, if the court lacks power to adjudicate such a cause of action in the first instance, it lacks power also to sanction a stipulation of settlement by entering a consent decree."

(2) The court may inquire into the existence and validity of the agreement, and the power or authority of the parties to execute the agreement. *Kelley v. Milan,* 127 U.S. 139 (1888) (mayor lacked power to enter stipulation on behalf of city); *West v. Bank of Commerce & Trusts, supra,* p. 10, (city attorney lacked power to enter stipulation); 3 Freeman on Judgments (5th Ed. 1925) section 1344 (a personal representative may have to obtain judicial aproval), 1346 (in certain jurisdictions, e.g., North Carolina, express au-

thority is needed), and 1349 (a hearing may be required to establish the fact or validity of the agreement). *See: Swift & Co. v. United States,* 276 U.S. 311, 324 (1928) (consent decrees are subject to review on appeal on claim of lack of consent).

(3) There frequently arise cases wherein the court will inquire whether or not the settlement is fair and equitable, e.g., when a party is a minor, *Glover v. Bradley,* 233 Fed. 721 (C.C.A. 4th 1916); in suits in equity, *Hot Springs Coal Co. v. Miller, supra,* p. 10;[6] and in cases where the public interest is involved, *West v. Bank of Commerce & Trusts, supra,* p. 10; *Rogan v. Essex County News Co., Inc., supra,* p. 10; *United States v. Radio Corporation of America, supra,* p. 10.

(4) And, of course, the agreement must be free of fraud. *Swift & Co. v. United States, supra.*

It is plain from the foregoing that when a stipulation for entry of judgment is presented to a trial court by the parties, the court is called on to do more than act as a robot or a rubber stamp. The court remains a judicial officer and cannot, by mere act of the parties, be divested of its judicial functions and its duty to exercise judicial discretion. That this is particularly so with respect to F.L.S.A. cases will be shown in the following portions of this brief.

---

[6]The court, in sustaining the validity of a decree quieting title to real property entered on a stipulation, said, at p. 681 of 107 F.2d: "It was submitted to the court for its approval, which approval was within the equitable powers of the court to grant *if it found the agreement equitable.* This the court did."

B. UNITED STATES DISTRICT COURTS COULD, PRIOR TO THE ENACTMENT OF THE PORTAL-TO-PORTAL ACT, REFUSE TO ENTER JUDGMENTS ON STIPULATION IN ACTIONS ARISING UNDER THE FAIR LABOR STANDARDS ACT.

In this section of the brief we direct attention solely to the ruling on December 20, 1946 of the District Court in refusing to sanction the stipulation for entry of judgment. At that time the Portal-to-Portal Act of 1947, 29 U.S.C.A. §§ 251 et seq., had not been enacted. We reserve for later discussion the effect of that enactment.

We need but briefly advert to a matter of which Appellants make great moment. They cite the statement made by the court below in its opinion of December 20, 1946 that "The court has jurisdiction to dismiss the action even though the reasons for so doing may be utterly inadequate." (R. 115; Brief p. 25). They attack the citation of *Haggard v. Pelicier Frères* [1892] A.C. 61, because, although in point, the case did not pass on the *merits* of the dismissal. Then they make the bold assertion that the court must have meant that it could act arbitrarily, leaving the parties with "no recourse whatever." This is absurd. The court was speaking of its *power* to dismiss and not of the propriety of its ruling. Lack of power is one thing; an improper ruling quite another. *Cf. Walling v. Miller, supra,* p. 11. The former may be attacked collaterally; the latter only directly. Appellants are now having "recourse" in this very appeal.

We come now to those factors differentiating an F.L.S.A. claim in federal courts from the "usual" civil case.

1. United States District Courts Are of Limited and Statutory Jurisdiction Requiring Parties Affirmatively to Establish and Maintain Jurisdiction.

The federal courts, with the exception of the Supreme Court, are not courts of general jurisdiction. Their jurisdiction is limited and entirely statutory, since it derives not directly from the Constitution but wholly from the authority of Congress. *Kline v. Burke Construction Co.,* 260 U.S. 226, 234 (1922); *Fisch v. General Motors Corp.,* 169 F.2d 266, 272 (C.C.A. 6th 1948), *cert. denied,* 335 U.S. 902. "* * * The presumption, in every stage of the cause, is, that it is without their jurisdiction unless the contrary appears from the record." *Börs v. Preston,* 111 U.S. 252, 255 (1884); *United States v. Green,* 107 F.2d 19, 22 (C.C.A. 9th 1939). Hence, the burden rests on the plaintiff to have the record affirmatively show the existence of jurisdiction. *Smith v. McCullough,* 270 U.S. 456 (1926); *Börs v. Preston, supra.* Obviously then, the consent of the parties cannot create jurisdiction in the courts of the United States. *See: Pacific R.R. v. Ketchum,* 101 U.S. 289, 298 (1879).

A district court therefore has the power *and is under a duty* to determine its jurisdiction even when not called to its attention by the parties. Lacking jurisdiction over the subject matter, the court lacks the power to enter a consent judgment in that action. *Walling v. Miller, supra,* p. 11.

2. All Rights Created Under the Fair Labor Standards Act Are Vested with Public Interest.

The rights created by the F.L.S.A., whether statutory or contractual, are not purely private affairs but have a "private-public character" and are "charged or colored with the public interest." *D. A. Schulte, Inc. v. Gangi,* 328 U.S.

108 (1946); *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697 (1945); *United States v. Darby,* 312 U.S. 100 (1941); *Battaglia v. General Motors Corp.,* 169 F.2d 254 (C.C.A. 2d 1948), *cert. denied,* 335 U.S. 887; *Darr v. Mutual Life Ins. Co.,* 72 F. Supp. 752 (D.S.D.N.Y. 1947), *aff'd.,* 169 F.2d 262, *cert. denied,* 335 U.S. 871.

It follows, then, that the courts have the power to question the fairness of a proposed settlement and to refuse to sanction a stipulated judgment that is not fair and equitable. *Rogan v. Essex County News Co., Inc., supra,* p. 10.; *Jarrard v. Southeastern Shipbuilding Corp.,* 163 F.2d 960 (C.C.A. 5th 1947) (by implication).

3. Prior to the Enactment of the Portal-to-Portal Act, the Validity of Any Compromise of a Claim Arising Under the Fair Labor Standards Act Was Generally in Doubt.

The authority on which Congress relied to enact the Fair Labor Standards Act was its power to regulate interstate commerce. The purpose, however, was to create a statutory scheme to protect certain segments of the population from substandard wages and excessive hours of employment. This scheme was to be uniform throughout the nation and was not to be contravened by contract or custom depriving employees of the statutory rights assured by the Act. *Jewell Ridge Coal Corp. v. United Mine Workers,* 325 U.S. 161 (1945).

It is not surprising, then, to find the Supreme Court ruling that a compromise agreement settling a claim arising under the Act in the absence of a bona fide dispute was not a bar to an action for liquidated damages. *Brooklyn Savings Bank v. O'Neil, supra.* In that case the Supreme

Court expressly refused to pass on the validity of a compromise agreement where a bona fide dispute did exist.

A year later, the latter question was before the court and it held that, despite the existence of a bona fide dispute, a compromise agreement settling a dispute over *coverage* was not a bar to a subsequent action for liquidated damages. *D. A. Schulte, Inc. v. Gangi, supra,* p. 14. And here, at page 114 of 328 U.S., the court said:

> "Nor do we need to consider here the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment."

Appellants cite this language (Brief p. 44) as giving "implicit approval" of compromises of disputes over the number of hours worked. If anything, it was an amber signal heralding an approaching red light whenever the question should arise, just as the question expressly left open in the *O'Neil* case was, to the extent it arose in the *Gangi* case, decided adversely to the general tenor of the contentions of Appellants.

It is, therefore, clear that in 1946—whether it be April, when the stipulation was presented, or whether it be December, when the court below rejected the stipulation—compromises in the absence of a bona fide dispute and compromises of a bona fide dispute over coverage were invalid, and that any other compromise of any of these statutory rights was, at the very least, suspect.

Mr. Justice Jackson, concurring in *Walling v. Portland Terminal Co.,* 330 U.S. 148, 154, 155 (1947) put it in this fashion:

> "This Court has foreclosed every means by which any claim, however dubious, under this statute or

under the Court's elastic and somewhat unpredictable interpretations of it, can safely or finally be settled, except by litigation to final judgment. We have held the individual employee incompetent to compromise or release any part of whatever claim he may have. *Brooklyn Savings Bank v. O'Neil,* 324 U.S. 697; *cf. D. A. Schulte, Inc. v. Gangi,* 328 U.S. 108. Then we refused to follow the terms of agreements collectively bargained. *Jewell Ridge Corp. v. United Mine Workers,* 325 U.S. 161. No kind of agreement between the parties in interest settling borderline cases in a way satisfactory to themselves, however fairly arrived at, is today worth the paper it is written on. Interminable litigation, stimulated by a contingent reward to attorneys, is necessitated by the present state of the Court's decisions."

4. Consent Judgments in Actions to Enforce Claims Arising Under the Fair Labor Standards Act Required "Judicial Scrutiny" Before Entry.

We have seen that judicial interpretation, resting on declared legislative policy, proscribed many, if not all, compromise agreements resulting from private bargaining. Consent judgments, *when sanctioned by a court,* stood on a somewhat different footing. In *North Shore Corp. v. Barnett,* 323 U.S. 679 (1944), the court did approve a stipulation for the entry of a consent judgment for a sum equal to two-thirds of the amounts awarded by the District Court. It should be noted, however, that there had been a full and complete trial on the merits, 52 F. Supp. 503, and an affirmance by the Circuit Court of Appeals of a judgment awarding overtime compensation, liquidated damages, and attorney fees, 143 F.2d 172, *before* the consent judgment was tendered and approved.

That case was called to the attention of the Supreme Court during its deliberations in *D. A. Schulte, Inc. v. Gangi, supra,* p. 14. The court dealt with it only in passing, by way of footnote. The highly illuminating portion thereof discussing consent judgments is as follows:

> "* * * Settlements of controversies under the Act by stipulated judgments in this Court are also referred to by petitioner. *North Shore Corp. v. Barnett,* 323 U.S. 679.
>
> "Petitioner draws the inference that bona fide stipulated judgments on alleged Wage-Hour violations for less than the amounts actually due stand in no better position than bona fide settlements. Even though stipulated judgments may be obtained, where settlements are proposed in controversies between employers and employees over violations of the Act, by the simple device of filing suits and entering agreed judgments, *we think the requirement of pleading the issues and submitting the judgment to judicial scrutiny* MAY *differentiate stipulated judgments from compromises by the parties.* At any rate, the suggestion of petitioner is argumentative only as no judgment was entered in this case." Footnote 8 at page 114 of 328 U.S.

In *Rogan v. Essex County News Co., Inc., supra,* p. 10, the District Court refused to enter judgment on stipulation in an action arising under the Fair Labor Standards Act, saying:

> "The proposed judgment is significantly not supported by either proof or a stipulation of facts * * * the District Court should deny its authoritative approval of private settlements except upon a clear showing that the statutory requirements have been met. It is be-

cause of the complete absence of such a showing that we must refuse to enter the proposed final judgment." Page 83 of 65 F. Supp.

The court below took the same action in the present case. It was proper.

In *Urbino v. Puerto Rico Ry. Light & Power Co.,* 164 F.2d 12, 14 (C.C.A. 1st 1947), the court held that a consent judgment was a bar to a subsequent action for liquidated damages because the settlement "receives the judicial approval implicit in the entry of a consent judgment."

Therefore, when the court below had before it the stipulation of the parties for entry of judgment, it not only had the power, but the duty, to exercise its judicial functions and its discretion as a condition precedent to the entry of the judgment. Indeed, it has been held, despite the general rule that a consent judgment is similar in its effect to any other kind of judgment, that "A judgment, not predicated upon stipulated facts, or upon findings of fact, or upon a determination on the merits, but merely to carry out a compromise agreement of the parties, fails to constitute an effective judicial determination of any litigated right." *Trapp v. United States,* 177 F.2d 1, 5 (C.A. 10th 1949), *cert. denied,* 339 U.S. 913; *Fruehauf Trailer Co. v. Gilmore,* 167 F.2nd 324 (C.C.A. 10th 1948). *Cf.: Assmann v. Fleming,* 159 F.2nd 332 (C.C.A. 8th 1947); *Jarrard v. Southeastern Shipbuilding Corp., supra,* p. 15; *Urbino v. Puerto Rico Ry. Light & Power Co., supra.*

It should be apparent now why Appellee did not at any time retreat from its position that any payments to be made on the claims of Appellants were conditioned on the entry of a judgment of the court. As the law then existed, any-

thing short of that would not have laid these claims to rest. Employers are entitled to a measure of protection as well. *Cf: Bracey v. Luray,* 161 F.2d 128 (C.C.A. 4th 1947), *cert. denied,* 332 U.S. 790.

5. There Are Close Analogies Supporting the Power of United States District Courts to Refuse to Enter Judgments on Stipulation in Actions Arising Under the Fair Labor Standards Act.

In *Kennedy v. Silas Mason Co.,* 334 U.S. 249 (1948), the question presented was the coverage under the Act of employees working for a munitions manufacturer under a "cost-plus-a-fixed fee" contract with the United States. The Supreme Court refused to determine the issue because the record, based on a summary judgment on the pleadings and affidavits, lacked a determination by the trial court of factual issues. In remanding the cause, the following most pertinent language was used:

At page 256:

> "The short of the matter is that we have an extremely important question, probably affecting all cost-plus-a-fixed fee war contractors and many of their employees immediately, and ultimately affecting by a vast sum the cost of fighting the war. No conclusion in such a case should prudently be rested on an indefinite factual foundation."

And at page 257:

> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

In *Waialua Agriculture Co. v. Maneja,* 178 F.2d 603 (C.A. 9th 1949), *cert. denied,* 339 U.S. 920, this Court re-

fused to affirm a declaratory judgment in an action brought to determine the non-coverage under the Act of certain employees, for the reason, among others, that judgment was not founded on fact.

A more distant analogy is found in the Anti-Trust Laws, which differentiate between "final judgments" and those entered on consent with respect to their use as prima facie evidence, as follows:

> "* * * This section shall not apply to consent judgments or decrees entered before any testimony has been taken." 15 U.S.C.A. Section 16.

When the present case is boiled down to fundamentals, we see that the trial judge, on presentation of the stipulation for entry of judgment on April 19, 1946, said:

> "I think in a public thing of this sort that it is my idea at this time that there be some proof submitted to support the judgment. I am not going to simply rubber stamp somebody's findings in these things." (R. 35).

In his opinion of December 20, 1946, refusing to enter judgment pursuant to the stipulation, the trial judge said, inter alia:

> "Likewise, the court has jurisdiction to refuse to enter judgment upon a stipulation which does not set out facts." (R. 115)

Although the words are different, the thoughts are practically identical with those expressed several years later by the Supreme Court in *Kennedy v. Silas Mason Co., supra,* p. 20, when it said that a conclusion in an important case should not "prudently be rested on an indefinite factual foundation" and that "good judicial administra-

tion" dictated that a decision be withheld until the court was presented with "a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts." In arriving at their respective conclusions both the supreme Court in the *Silas Mason* case and the trial court in the present case performed their duties, functioned as judicial officers, exercised discretion. To do so is not error.

C. THE DISTRICT COURT DID NOT ERR WHEN, ON DECEMBER 20, 1946, IT REFUSED TO ENTER THE JUDGMENT AS STIPULATED.

We have thus far shown that in any action brought in the federal courts to enforce a claim arising under the Fair Labor Standards Act wherein a stipulation for entry of judgment on consent is filed, the court has the right—and the duty—to establish that the court has jurisdiction, that there in fact exists a cause of action, and that the judgment is in the public interest. The court below exercised that right and duty, and concluded that the judgment should not be entered. That such conclusion was correct is shown by the following specific consideration of the record.

1. Entry of Judgment Was Properly Refused Because the Jurisdiction of the Court Was Not Adequately Established.

Appellants apparently make some claim that jurisdiction is founded in part on diversity (R. 2-3; Brief p. 2). A FLSA claim need not rest on diversity. If it did, Appellants have utterly failed to establish it. The complaint contains an allegation that defendant is a Nevada corporation (R. 3). The complaint is devoid of any allegations of the citizenship of the Appellants. The record is devoid of any proof of the citizenship of the Appellants. It is consistent, then, that some, if not all, of the Appellants are citizens of Nevada. Therefore, diversity jurisdiction does not exist on

this record. 28 U.S.C.A., Section 1332; *Börs v. Preston, supra,* p. 14.

Furthermore, none of the claims asserted by any of the Appellants meets the jurisdictional amount of $3,000. 28 U.S.C.A. Section 1332. The claim of each Appellant is separate and distinct. The claims therefore are not aggregated when determining the jurisdictional amount. *Pinel v. Pinel,* 240 U.S. 594 (1916); *Fisch v. General Motors Corp., supra,* p. 14.

Diversity jurisdiction cannot be established merely by citing the statute which creates it.

It may be argued that the *allegations* in the complaint (R. 2) are sufficient to show coverage under the Act. However, the trial judge was not satisfied with the stipulation insofar as it related (or failed to relate) to the question of coverage. The court commented extensively on this subject in its opinion (see R. 113-116) and in that connection said (R. 115):

> "The court is still impressed with the position that even in private litigation the plaintiffs, or others in their situation, would not be permitted simply to enter a compromise judgment *upon a stipulation which did not set up facts showing their coverage. This stipulation is devoid of any agreement as to such facts.*"

In its catalogue of questions of fact and principles of law arising from the stipulation, the court listed (a) the question as to whether Appellee was engaged in the production of goods for commerce (b) the question as to whether Appellants were so engaged while guarding the main installations of the shipyard and (c) the question whether Appellants were so engaged while guarding other installations only indirectly connected with construction (R. 116). All

of these questions relate to coverage under the Act. They involved the jurisdiction of the court, and it had the right to go into the question of its jurisdiction.

The fact that Appellee was operating under a cost-plus-a-fixed-fee contract with the United States raised serious doubts as to whether the claims of Appellants were cognizable under the Act. The contentions variously made in similar cases were that the employer was an agent of the United States, that the employees were not "engaged in the production of goods for commerce," that neither the employees nor the employer was "engaged in commerce," that the munitions or ships were not "goods" within the meaning of the Act, and that the claims were cognizable only under the Walsh-Healey Act. *United States Cartridge Co. v. Powell,* 174 F.2d 718 (C.A. 5th *en banc* 1949), *rev'd.,* 339 U.S. 497 (1950); *St. Johns River Shipbuilding Co. v. Adams,* 164 F.2d 1012 (C.C.A. 5th *en banc* 1947); *Kennedy v. Silas Mason Co.,* 164 F.2d 1016 (C.C.A. 5th *en banc* 1947), *rev'd. on other grounds,* 334 U.S. 249 (1948);[7] *Kruger v. Los Angeles Shipbuilding & Drydock Corp.,* 74 F. Supp. 595 (D.S.D. Cal. 1947); *Anderson v. Federal Cartridge Corp.,* 72 F. Supp. 644 (D. Minn. 1947), *aff'd sub nom Brenna v. Federal Cartridge Corp.,* 174 F.2d 732 (1949), *and rev'd.,* 183 F.2d 414; *Barksdale v. Ford, Bacon & Davis, Inc.,* 70 F. Supp. 690 (D.E.D. Ark. 1947); *Love v. Silas Mason Co.,* 66 F. Supp. 753 (D.W.D. La. 1946). There are decisions holding such employees covered (cases collected, footnote 5, p. 723 of 174 F.2d, *supra*). In these cases, the decision frequently turned on the terms of the particular contract (the contract was not before the court below, R. 127), or

[7]See discussion at page 253 of 334 U.S.

on the nature of the goods being produced, or on their ultimate intended use. The posture of this case has never been such that these matters could be ascertained.

Appellants refer to the Supreme Court ruling in *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950), *supra*, p. 24. That decision, for the first time, was a definitive answer on this aspect of the coverage question. It was rendered on May 8, 1950. The action of the court below was taken on December 20, 1946. That action was not erroneous, save under the clearer view always afforded by hindsight. We reserve for discussion in Part II of this brief the effect of the Supreme Court decision in the *Powell* case on the District Court's ruling on Appellants' Motion for Entry of Judgment filed December 19, 1949, and denied July 31, 1950.

2. Entry of Judgment Was Properly Refused Because the Existence of a Claim Was Not Adequately Established.

In addition to failing to establish *the facts* showing coverage as to each Appellant, the Appellants failed to show as to each of them that thirty minutes' preliminary work was performed in response to the roll call requirements. While it is true that, as Appellants point out (Brief p. 3), testimony relative to written instructions requiring Appellants to report for roll call one-half hour early was offered by Appellee, the same witness at that time testified as follows:

> "* * * However, from an actual practice that particular rule was never enforced. The roll call time gradually got later and later, and if a man was late he wasn't penalized, or anything of that nature, for coming in late." (R. 40).

This witness also testified that the actual time reported in advance varied from a few minutes to a maximum of thirty minutes (R. 41). Counsel for Appellants informed the court, on April 23, 1946, that Appellant Maple had the day previously informed him that during part of the time involved the Appellants were "on duty" only twenty minutes (R. 52). Those Appellants who did testify said it was a full thirty minute period (R. 79, 82, 83). At best this creates a conflict of testimony (R. 112). When rejected by the trial court, it does not constitute a factual basis for the existence of a valid claim. A settlement based on the compromise of a claim known to be invalid is not enforceable. *See: McPike v. Superior Court,* 220 Cal. 254, 259, 30 P.2d 17, 19 (1934).

3. Entry of Judgment Was Properly Refused Because the Judgment Was Not in the Public Interest.

We have seen that the Fair Labor Standards Act is of a "public-private" nature, so that the claims arising thereunder are vested with a public interest (*supra,* pp. 14-15).

Facts supporting coverage were never introduced to the satisfaction of the court below (R. 115). The compromise of a bona fide dispute over coverage settled by private bargaining had been declared invalid. *D. A. Schulte, Inc. v. Gangi, supra,* p. 14. The validity of compromises of purely factual disputes involving the number of hours' work was expressly not passed on in that case. Consent judgments were likewise left in a state of doubt. See discussion herein, *supra* at pages 15-20. In view of the law then existing, the refusal to sanction a settlement if it involved in part a compromise of coverage was not error. *Rogan v. Essex County News Co., Inc., supra,* p. 10.

Furthermore, the formula for settlement was determined for the entire group of claimants and applied in wholesale manner (R. 38-42). A comparison of the demands made by Appellants (R. 7-8, 11) with the amounts stipulated to be due (R. 25-27) discloses that 24 of the latter amounts were *less than* the claims asserted, despite the fact that the settlement purported to be a compromise of claims for both overtime compensation and liquidated damages. On such a record the court below was justified in refusing to accept the stipulation and in requiring a trial on the merits.

Furthermore, the public-interest of the present litigation was accentuated by the fact that the ultimate burden of the judgment would rest on the United States by virtue of its contract with Appellee. The court below cited *Love v. Silas Mason Co., supra,* p. 24 (and we have seen that it did not stand alone) as further support of its duty carefully to scrutinize the settlement presented for approval. The court below did not err in so scrutinizing the settlement nor did it err in exercising its judicial discretion when it refused, on December 20, 1946, to sanction the agreement.

II. The District Court Did Not Err in Denying the Motions for Entry of Judgment Upon Stipulation or, in the Alternative, for Summary Judgment or for Leave to File Supplemental Complaint.

The stipulation for entry of judgment was filed and presented on April 19, 1946 (R. 22). After hearings and the introduction of evidence in support of the stipulation, the District Court refused, on December 20, 1946, to enter judgment thereon (R. 110-125). We have demonstrated in Section I of this brief that said refusal was not error.

On May 14, 1947, the Portal-to-Portal Act of 1947 became effective. On September 22, 1947, Appellee filed an amended

answer raising affirmative defenses under that Act (R. 139-142). More than two years later, on December 19, 1949, Appellants filed motions for (a) entry of judgment pursuant to the stipulation of April 19, 1946, (b) for summary judgment on the basis of the settlement or compromise embodied in that stipulation or (c) for leave to file a further supplemental complaint based on such compromise and settlement (R. 143-160). These motions were denied on July 31, 1950 (R. 172-173). We now turn to a consideration of Appellants' attack on the denial of such motions.

A. THE MOTION FOR ENTRY OF JUDGMENT ON THE STIPULATION WAS PROPERLY DENIED.

1. Fed. Rules Civ. Proc., Rule 68, 28 U.S.C.A. Is Inapplicable to This Case.

Appellants make their motion pursuant to Fed. Rules Civ. Proc., Rule 68, 28 U.S.C.A. (R. 143). They argue that this rule affects the instant case (Brief p. 24). The rule provides for Offer of Judgment and is concerned only with the effect of such an Offer on costs. It has no bearing on the entry of a consent judgment. *Cf: Maguire v. Federal Crop Insurance Corp.,* 181 F.2d 320 (C.A. 5th 1950) (offer of compromise not within Rule 68).

2. Certain of the Grounds Sufficient to Sustain the Refusal to Enter Judgment on December 20, 1946, Still Existed on July 31, 1950.

We have demonstrated (*supra,* pp. 22-27) that the refusal to accept the stipulation was not erroneous because (1) the jurisdiction of the court had not been adequately established, (2) the existence of a claim had not been adequately established, and (3) the judgment was not in the public interest. We shall briefly re-examine these grounds

in light of the law existing on July 31, 1950, reserving, however, full discussion of the effect of the Portal-to-Portal Act of 1947 for the very next subsection.

(1) *Lack of Jurisdiction:*

Diversity jurisdiction has never been established.

No additional *evidence* has been adduced to demonstrate, to the satisfaction of the court, which of, if any, and for what period, Appellants, and each of them, were "engaged in the production of goods for commerce."

The decision of *Powell v. United States Cartridge Co.*, 339 U.S. 497 (1950) now makes it clear that the employer's being under a Government cost-plus contract does not of itself preclude coverage. Nonetheless, each claimant must show that *his* activities qualify. This has never been satisfactorily done.

(2) *Lack of a Claim:*

No additional evidence has been adduced to demonstrate, to the satisfaction of the court, that each of the Appellants had a valid claim for the period involved.

(3) *Failure to Meet the Public Interest:*

The questions as to coverage raised by the trial court have never been eliminated. Section 3 of the Portal-to-Portal Act sanctions compromises "if there exists a bona fide dispute as to the amount payable by the employer to his employee * * *" 29 U.S.C.A. Sec. 253(a). Until the coverage issues are disposed of, the dispute here may involve more than a dispute "as to the amount payable." Section 3 also excepts from its approval compromises settled "on a payment for overtime at a rate less than one and one-

half times such minimum hourly wage rate." 29 U.S.C.A. Sec. 253(a). The formula used for computations caused 24 of the claimants to agree to amounts less than the overtime wages demanded. The requirements of Section 3 have not been met. *Cf.: Stilwell v. Hertz Drivurself Stations,* 174 F.2d 714 (C.A. 3rd 1949).

The decision in *Powell v. United States Cartridge Co., supra,* p. 29, indicates that the United States is not to be treated as the real party in interest in the instant case. This factor standing alone would cast doubt on the propriety of the denial of this motion on this ground. However, the uncorrected infirmities discussed above constitute ample support for the denial. Moreover, there exists, as a result of the enactment of the Portal-to-Portal Act of 1947, a supervening infirmity: the glaring and overriding defect of which Appellants are completely oblivious and which they totally ignore. To this we now turn.

3. The Enactment of the Portal-to-Portal Act of 1947 Deprived the District Court of Jurisdiction Over This Matter.

The complaint in the instant case was filed on December 7, 1945. A [first] supplemental complaint naming additional plaintiffs was filed January 30, 1946. The nature of the claims may best be gleaned from the following allegations made by Appellant Macklin:

> "* * * said plaintiff was employed by defendant as aforesaid at the regular hourly rate of 95¢ and was paid at said rate, with time and one half for certain of the overtime hours worked by him, *including the time spent in patrolling his regular beat; that in addition to the time for which said plaintiff was paid as aforesaid, said plaintiff was employed and compelled by defendant to work thirty (30) minutes per day as*

a result of the fact that plaintiff was required to report for roll call, inspection, and other duties 30 minutes in advance of going on patrol of his regular beat; * * * " (Complaint, R. 5).

The allegations of the other Appellants are similar (R. 8, 10-11).

It is clear that the claims are founded on "preliminary" activities which were not part of Appellants' regular duties. At the time of filing, the Complaint may have stated a claim upon which relief could be granted, *Baker v. California Shipbuilding Corp.,* 73 F. Supp. 322 (D.S.D. Cal. 1947), because of the interpretation of the Fair Labor Standards Act in cases like *Jewell Ridge Coal Corp. v. United Mine Workers, supra,* p. 15, and *Anderson v. Mt. Clemens Pottery Co.,* 328 U.S. 680 (1946).

The veritable flood of actions occasioned by these decisions, brought by claimants eager to share in the "windfall" of overtime compensation for preliminary and postliminary activities—the so-called "portal-to-portal" activities —was a compelling reason for the enactment of the Portal-to-Portal Act of 1947. Congress, faced with a major threat to the economic equilibrium of the country, took decisive action. The amendment became effective on May 14, 1947. C. 52, Secs. 1 et seq., 61 Stat. 84; 29 U.S.C.A. Section 251, et seq.

Congress was selective in its pruning. Not all claims were destroyed. Spared were those based on "an activity which was compensable by either (1) an express provision of a written or nonwritten contract in effect, at the time of such activity * * *; or (2) a custom or practice in effect, at the time of such activity, at the establishment or other place

where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity * * *" 29 U.S.C.A. Sec. 252(a). All other claims were destroyed.

The activities upon which Appellants found their claims are clearly within the interdiction of the statute. The complaint and the [first] supplemental complaint are devoid of any allegations that the activities were compensable by contract or custom. From May 14, 1947 on, they no longer stated a claim upon which relief could be granted. 29 U.S.C.A. Sec. 252(a). The requirement is jurisdictional. 29 U.S.C.A. Sec. 252(d). The District Court therefore was deprived of jurisdiction in this case. *Bauler v. Pressed Steel Car Co., Inc.,* 182 F.2d 357 (C.A. 7th 1950); *Potter v. Kaiser Company, Inc.,* 171 F.2d 705 (C.A. 9th 1949); *Battery Workers' Union v. Electric Storage Battery Co.,* 78 F. Supp. 947 (D.E.D. Pa. 1948). "Nor does the lack of jurisdiction seem any the less manifest because jurisdiction existed at the time of the commencement of the various actions." Medina, D. J. in *Bartels v. Sperti, Inc.,* 73 F. Supp. 751, 753 (D.S.D. N.Y. 1947).

4. There Is No Escape for Appellants from the Bar of the Portal-to-Portal Act of 1947.

This case is to be decided according to existing law. *Woods v. Schmid,* 164 F.2d 981 (C.C.A. 5th 1947); *McCloskey v. Eckart,* 164 F.2d 257 (C.C.A. 5th 1947). It was pending at the time of the enactment. The Portal-to-Portal defenses were properly raised by Appellee's Amended Answer filed, with leave of court, on September 22, 1947 (R. 130). They may be raised any time before a final judgment becomes no longer subject to review, e.g., after denial of

certiorari by the Supreme Court;[8] *sua sponte* by the Court of Appeals;[9] in the District Court;[10] after entry of judgment on default,[11] even despite procrastinating delays of the defendants.[12]

The "judgment" (Order of Dismissal) in the instant case, while final for purposes of appeal, is, of course, subject to review. The Portal-to-Portal defenses are therefore properly before this Court.

The presence of a stipulation for entry of judgment is of no aid to Appellants. It does not transmute Appellants' claims into a higher order of being, impervious to the orderly processes of judicial administration. In *Blount v. Windley,* 95 U.S. 173, 176 (1877), the court said:

> "The judgment itself presupposes, and is founded on, some antecedent obligation or contract, and is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the contract remains unchanged; and, in deciding how far it may be affected by legislation, we must look mainly to the original contract."

A *judgment* is not impregnable; *a fortiori* a stipulation for judgment is not.

It is pertinent to quote again from *Walling v. Miller, supra,* p. 11:

---

[8]Alaska Juneau Gold Mining Co. v. Robertson, 331 U.S. 793 (1947); 149 Madison Avenue Corp. v. Asselta, 331 U.S. 795 (1947).

[9]Tipton v. Bearl Sprott Co., Inc., 175 F.2d 432 (C.A. 9th 1949).

[10]United States Cartridge Co. v. Powell, 185 F.2d 67 (C.A. 8th 1950).

[11]McCloskey & Co. v. Eckart, 164 F.2d 257 (C.C.A. 5th 1947).

[12]Michigan Window Cleaning Co. v. Martino, 173 F.2d 466 (C.A. 6th 1949).

> "On the other hand, if the court lacks power to adjudicate such a cause of action in the first instance, it lacks power also to sanction a stipulation of settlement by entering a consent decree."

The rule that parties cannot confer jurisdiction by consent bears with all of its might on the instant case and precludes any recovery by Appellants (see *supra,* p. 11).

The provisions of Section 3 of the Portal-to-Portal Act, 29 U.S.C.A., Sec. 253, are of no aid to Appellants. Appellants argue that Section 3 has retroactively validated compromises of disputes arising under the Fair Labor Standards Act (Brief pp. 45-47). We have already indicated that not all compromises were validated (*supra,* pp. 29-30). There is, however, an even more complete answer to Appellants' arguments.

Appellants omitted two words when quoting said section, the two words "as amended." Subsection (a) therefore reads as follows:

> "Any cause of action under the Fair Labor Standards Act of 1938, *as amended,* the Walsh-Healey Act, or the Bacon-Davis Act, which accrued prior to May 14, 1947, or any action (whether instituted prior to or on or after May 14, 1947) to enforce *such a cause of action,* may hereafter be compromised in whole or in part, if there exists a bona fide dispute as to the amount payable by the employer to his employee; * * *" 29 U.S.C.A. Sec. 253(a).

What Congress validated, as the plain language of the statute discloses, was the compromise of either a cause of action under the Fair Labor Standards Act *as amended* or of an action to enforce such a cause of action. The Portal-to-Portal Act amended the Fair Labor Standards

Act. *Holland v. General Motors Corp.,* 75 F. Supp. 274 (D.W.D.N.Y. 1947), *affirmed sub nom, Battaglia v. General Motors Corp.,* 169 F.2d 254, *cert. denied,* 335 U.S. 887. Appellants no longer have a "cause of action under the Fair Labor Standards Act of 1938, *as amended.*" Nor is this action one "to enforce such a cause of action." Appellants seek to invoke one section which gave life to certain classes of compromises while they completely ignore the immediately preceding section which destroyed their claims (causes of action) and deprived the court of jurisdiction over the entire action. "When the root is cut the branches fall." Holmes, J., in *Smallwood v. Gallardo,* 275 U.S. 56, 62 (1927).

Since Appellants lack a meritorious claim, opportunity to amend would be futile. Whenever the requirements of Section 2 of the Portal-to-Portal Act, 29 U.S.C.A., Section 252, are first called to the attention of claimants, an opportunity to amend is ordinarily given. *Tipton v. Bearl Sprott Co., Inc., supra,* p. 33. The Portal-to-Portal Act provides no period of limitation for such an amendment.[13]

The Portal-to-Portal Act of 1947 became law on May 14, 1947. The defenses thereunder were forcibly brought home to Appellants on September 22, 1947, on which date Appellee's Amended Answer was filed. Appellants had anticipated the applicability of its provisions (R. 150). At no time have Appellants amended or requested leave to amend their complaint to show the necessary jurisdictional allegations. Appellants have "the burden of clearly stating and proving [themselves] within an exception of the Portal-to-Portal Act in order to sustain the Jurisdiction of the

[13]Compare 29 U.S.C.A. Sections 255-257.

Court." *Bumpus v. Remington Arms Co., Inc.,* 183 F.2nd 507, 513 (C.A. 8th 1950). Appellants have done nothing to sustain this burden. The [second] supplemental complaint tendered December 19, 1949 (R. 157-160) cannot, by the wildest stretch of imagination, be construed to supply the missing allegations of compensability. It may be fairly inferred there are none. *Cf: Adkins v. E. I. DuPont de Nemours & Co.,* 176 F.2d 661 (C.A. 10th 1949), *cert. denied,* 338 U.S. 895.

It is not necessary to rely on inference alone. Appellants concede that the instant case is similar in all respects, save the presence here of a stipulation for judgment, with *Potter v. Kaiser Company, Inc., supra,* p. 32 (R. 151). The *Potter* case was dismissed because the complaint failed to state a claim upon which relief could be granted and for lack of jurisdiction. This Court affirmed in a per curiam decision. 171 F.2d 705. There was no "contract" or "custom" there to save the claims; there is none here.

Moreover, there are damaging admissions in the record. Paragraph 18 of the affidavit filed in support of the three motions, reads as follows:

> "18. That for several months thereafter counsel for plaintiffs were both extremely busy with other litigation of considerable importance and also undecided as to what course of action to take in this case in view of the fact that this Court had declined to approve the aforesaid settlement and *the Circuit Court of Appeals in the Potter case appeared to have foreclosed recovery on the merits of the original cause of action,* but that said counsel at all times took the position that said settlement was legal and binding." (R. 153; also see R. 191).

On this record, it is clear the complaint is fatally defective. This Court so held in affirming the dismissal of the companion *Potter* case. Appellants have not, and could not now in good conscience, amend and cure the defect. On this basis alone the order of dismissal should be affirmed.

B. THE MOTION FOR SUMMARY JUDGMENT WAS PROPERLY DENIED.

The motion for summary judgment, made pursuant to Fed. Rules Civ. Proc., Rule 56, 28 U.S.C.A., was properly denied. As hereinabove fully demonstrated, the complaint fails to state a claim upon which relief can be granted. The District Court lacked jurisdiction. On such a record the District Court should have dismissed for want of jurisdiction. *Jones v. Brush,* 143 F.2nd 733 (C.C.A. 9th 1944). The denial of the motion for summary judgment was not error. *Kennedy v. Silas Mason Co.,* 334 U.S. 249 (1948).

C. THE MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT WAS PROPERLY DENIED.

1. The [Second] Supplemental Complaint, if It Purports to State a Claim Arising Under the Fair Labor Standards Act, as Amended, Fails to State a Claim Upon Which Relief Can Be Granted.

As hereinbefore noted (*supra,* pp. 30-32), the complaint and the [first] supplemental complaint state claims arising under the Fair Labor Standards Act for activities which are purely "preliminary." The Portal-to-Portal Act of 1947 precludes recovery thereon unless such activities were "compensable by either (1) an express provision of a written or nonwritten contract * * * or (2) a custom or practice * * * not inconsistent with a written or nonwritten contract * * *." 29 U.S.C.A. Sec. 252(a). The complaint and the [first] supplemental complaint contain no allegations with

respect to compensability by either a contract or a custom or practice. These complaints have never been amended. The [second] supplemental complaint contains no such allegations.

No claim upon which relief can be granted is stated.

2. The [Second] Supplemental Complaint, if It Purports to State a Claim Arising Under Section 3 of the Portal-to-Portal Act, Fails to State a Claim Upon Which Relief Can Be Granted.

Section 3 of the Portal-to-Portal Act does not purport to create a new cause of action based on compromises. *See:* 29 U.S.C.A., Sec. 253(c); *Cf.: McCloskey v. Eckart, supra,* p. 32. Even if it did, the compromises recognized are only those of a dispute "as to the amount payable" and the agreement cannot be based on "a rate less than one and one-half times such minimum hourly wage rate." 29 U.S.C.A. Sec. 253(a). As hereinbefore noted (*supra,* pp. 29-30), this compromise is not within said Act.

Moreover, the only cause of action created (if it be assumed that Section 3 did so) is a cause of action arising under the Fair Labor Standards Act, *as amended.* As hereinbefore noted (*supra,* pp. 31-37), Appellants have no such cause of action.

No claim upon which relief can be granted is stated.

3. To the Extent the [Second] Supplemental Complaint Is Founded on the Fair Labor Standards Act and the Portal-to-Portal Act, It Does Not Contain Necessary Jurisdictional Allegations.

For the foregoing reasons, the [second] supplemental complaint is devoid of the necessary jurisdictional allegations. 29 U.S.C.A. Sec. 252(d). The District Court lacks jurisdiction thereover.

4. The [Second] Supplemental Complaint, if It Purports to State a New, Independent Claim, Fails to State a Claim Upon Which Relief Can Be Granted.

The allegations of the [second] supplemental complaint indicate that Appellants found their claim on an alleged breach of contract (R. 157-160). The "contract" which, so it is alleged, Appellee has broken is set forth in the Record (R. 22-27). Appellee merely agreed "that judgment may be made and entered by the above entitled Court * * *." (R. 24). A stipulation for entry of a consent decree is not a contract. *Cf: United States v. Swift & Co.,* 286 U.S. 106 (1932); *Fleming v. Huebsch Laundry Corp.,* 159 F.2d 581 (C.C.A. 7th 1947).

Furthermore, even if it be assumed there was a contract, there was no breach thereof by Appellee. The *court* refused to enter judgment.

Appellants allege:

> "That thereafter defendant refused and still refuses to make the payments agreed upon under said compromise and settlement." (R. 158).

Appellee agreed to the entry of *judgment* for payment (R. 24). There was no promise to pay, save on condition that a judgment be entered. That judgment was never entered. The non-entry cannot be attributed to Appellee. There has been no breach.

5. To the Extent the [Second] Supplemental Complaint Is Founded on a New, Independent Claim, It Does Not Contain Necessary Jurisdictional Allegations.

As a cause of action in contract, jurisdiction is allegedly founded on diversity of citizenship (R. 157). Said complaint is defective in two respects:

(1) There is no allegation of diversity of *citizenship.* 28 U.S.C.A., Sec. 1332. Appellants have alleged that "all of the plaintiffs are residents and inhabitants of states other than that of the defendant herein * * *" (R. 157). This allegation is clearly insufficient to establish diversity jurisdiction. The words "inhabitants" and "residents" are not synonymous with "citizens" for these purposes. *Neel v. Pennsylvania Co.,* 157 U.S. 153 (1895); *Grace v. American Central Insurance Co.,* 109 U.S. 278 (1883); *Jeffcoat v. Donovan,* 135 F.2d 213 (C.C.A. 9th 1943); *Allen B. Wrisley Co. v. George E. Rouse Soap Co.,* 90 Fed. 5 (C.C.A. 7th 1898).

(2) The amount involved does not meet the jurisdictional amount. 28 U.S.C.A., Sec. 1332. Appellants have alleged that "this cause involves the claim of plaintiffs for in excess of $3,000.00" (R. 157). The claim of each Appellant is a separate and distinct claim. None of these claims exceeds $3,000 (Exhibit A to said Complaint, R. 159-160). The claims cannot be aggregated for purposes of determining the jurisdictional amount. *Pinel v. Pinel, supra,* p. 23; *Woodside v. Beckham,* 216 U.S. 117 (1910); *McDaniel v. Brown & Root, Inc.,* 172 F.2d 466 (C.A. 10th 1949); *Willis v. E. I. DuPont de Nemours & Co.,* 171 F.2d 51 (C.A. 10th 1948); *Fisch v. General Motors Corp., supra,* p. 14; *Tittle v. General Motors Corp.,* 80 F. Supp. 333 (D. Conn. 1948). While attorneys' fees may be aggregated with the demands of each claimant, the pro rata share of the fees involved herein are insufficient to raise the particular claim to the requisite amount.

6. A Supplemental Complaint, Alleging a Contract Claim, Founded Upon a Stipulation for Entry of Judgment, in an Action Wherein the Original Complaint Fails to State a Claim Upon Which Relief Can Be Granted, May Not Be Filed.

Even if it be assumed that the original complaint filed herein stated a claim upon which relief can be granted, and that the stipulation created a valid contract, the subject matter of said contract was within the reach of Congress. The basic claims sprang from statutory rights created by Congress upon the enactment of the Fair Labor Standards Act. Congress has authority to modify, alter or destroy these rights. Contracts based thereon are subject to this "congenital infirmity." *Louisville & Nashville R.R. v. Mottley,* 219 U.S. 467 (1911); *Bateman v. Ford Motor Co.,* 76 F. Supp. 178 (D.E.D. Mich. *en banc* 1948), *affirmed sub nom Fisch v. General Motors Corp.,* 169 F.2d 266, *cert. denied,* 335 U.S. 902; *Holland v. General Motors Corp., supra,* p. 35.

In the leading case, *Norman v. Baltimore & Ohio R.R.,* 294 U.S. 240, 307 (1935), Chief Justice Hughes, speaking for the court, said:

> "Contracts, however express, cannot fetter the constitutional authority of Congress. Contracts may create rights of property, but when contracts deal with a subject matter which lies within the control of Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

If the [second] supplemental complaint be treated as an amendment to the original complaint, which failed to state

a claim upon which relief can be granted, on the enactment of the Portal-to-Portal Act, it is insufficient to cure the defects therein. As a supplemental claim, arising subsequent to the filing of the original complaint, which failed to state a claim upon which relief can be granted, on the enactment of the Portal-to-Portal Act, it is insufficient. *Bonner v. Elizabeth Arden, Inc.,* 177 F.2d 703 (C.A.2d 1949); *Bowles v. Senderowitz,* 65 F. Supp. 548 (D.E.D. Pa. 1946), *affirmed on other grounds,* 158 F.2d 435, *cert. denied,* 330 U.S. 848; *Berssenbrugge v. Luce Manufacturing Co.,* 30 F. Supp. 101 (D.W.D. Mo. 1939). In the *Bonner* case, the court said:

> "For where the pleading sought to be supplemented is a complaint that fails to state a cause of action (as the original amended complaint here failed, on the enactment of the Portal to Portal Act), the plaintiff cannot avoid the effect of lack of jurisdiction over the original action by alleging a new cause of action subsequently accruing because of later transactions, occurrences or event." (At page 705 of 177 F.2d.)

The stipulation for entry of judgment does not call for a different rule. *Fleming v. Rhodes,* 331 U.S. 100 (1947); *Woods v. Schmid,* 164 F.2d 981 (C.C.A. 5th 1947). In the *Rhodes* case, an injunction against the enforcement of judgments of eviction obtained in state courts was refused by the District Court. The Supreme Court reversed, although assuming the judgments valid when entered, because of the retroactive effect of the Emergency Price Control Extension Act. The Court, at page 107 of 331 U.S., said:

> "Federal regulation of future action based upon rights previously acquired by the person regulated is not prohibited by the Constitution * * *. Immunity

> from federal regulation is not gained through forehanded contracts * * *. The rights acquired by judgments have no different standing."

Similarly, in *Woods v. Schmid, supra,* p. 32, an injunction was sought. The District Court denied the injunction with respect only to those judgments obtained by stipulation. The Circuit Court of Appeals held this error, saying at page 982 of 164 F.2d:

> "It therefore becomes manifest that, although the eviction agreements with the tenants were not illegal when made, any attempt to enforce them after the Price Control Extension Act had been passed was unlawful, as they had then been invalidated by the very provisions of the Act itself."

In the instant case, we have at most an agreement for the entry of judgment which at one time *may* have been valid. Legislation admittedly constitutional now makes such an agreement invalid. It is unenforceable.

III. The District Court Did Not Err in Dismissing the Action for Want of Prosecution.

A. THE DISTRICT COURT HAS POWER TO DISMISS FOR WANT OF PROSECUTION ON ITS OWN MOTION.

An inherent power vested in trial courts is the power to dismiss for want of prosecution. This power exists independently of statute. It may be exercised by United States District Courts. *Shotkin v. Westinghouse Electric & Mfg. Co.,* 169 F.2nd 825 (C.C.A. 10th 1948); *Sweeney v. Anderson,* 129 F.2d 756 (C.C.A. 10th 1942); *Walker v. Spencer,* 123 F.2d 347 (C.C.A. 10th 1941), *cert. denied,* 316 U.S. 692; *Hicks v. Bekins Moving & Storage Co.,* 115 F.2d 406 (C.C.A. 9th 1940). It may even be exercised in criminal proceedings.

United States v. McWilliams, 163 F.2d 695 (App. D.C. 1947).

B. THE EXERCISE THEREOF MAY BE REVERSED ONLY FOR GROSS ABUSE OF DISCRETION.

"The trial judge who has litigants before him over long periods knows the diligent suitors from those who are not diligent." *Partridge v. St. Louis Joint Stock Land Bank,* 130 F.2d 281, 287 (C.C.A. 8th 1942). "* * * A trial court's evaluation of the parties' diligence carries almost commanding weight * * *." *United States v. Pacific Fruit & Produce Co.,* 138 F.2d 367, 371 (C.C.A. 9th 1943). "* * * The question whether the action should be dismissed on the court's own motion for failure to prosecute with reasonable diligence rests largely in the sound judicial discretion of the court and its action with respect thereto will not be overturned on appeal except in case of abuse of such discretion." *Shotkin v. Westinghouse Electric & Mfg. Co., supra,* at page 826 of 169 F.2d. "And by abuse of discretion is meant action which is arbitrary, fanciful, or clearly unreasonable." *United States v. McWilliams, supra,* at page 697 of 163 F.2d.

In this Court, a GROSS abuse of discretion must be shown to warrant reversal. *Hicks v. Bekins Moving & Storage Co., supra,* p. 43.

C. THERE WAS NO ABUSE OF DISCRETION IN THE INSTANT CASE.

1. The "Ruling" of the District Court on January 3, 1950, Did Not Preclude the Subsequent Order of Dismissal.

During oral proceedings had before the court below, after a prior warning of a possible dismissal for want of prosecution, and in response to a statement by counsel for Appellee

that defendant would not request a dismissal for want of prosecution, the court said:

> "*I think* in view of that situation the Court will not dismiss the case on its own motion." (R. 166)

Appellants in their brief consistently ignore the emphasized words (Brief pp. 8-9, 10, 51) and, by omitting them, purport to make of it a positive statement (Brief p. 65).

Qualified as the statement was, it cannot be classified as a "ruling" despite repetitious labelling of it as such by Appellants.[14] Even if it were a "ruling", the court below could subsequently reverse itself. Indeed, that is what Appellants asked of the court, with respect to the refusal to sanction the settlement in 1946, by filing their motions on December 19, 1949. Furthermore, Appellants have shown no prejudice to raise an estoppel, if such be their theory. Furthermore, they had had previous notice in open court of the possible dismissal (R. 161-164), were afforded and took advantage of the opportunity to file an affidavit in opposition thereto (R. 145-156, 166).

---

[14]If the trial court's use of the words "I think" constitutes a ruling, then it is interesting to note the number of rulings that the trial court made during the proceedings of December 12, 1949:

> "*I think* you are asking a good deal of the Court * * * *I think* that there wasn't anything in the case before the passage of the Taft-Hartley Act, and *I don't think* so yet, as far as I am concerned * * * I will look your amended pleading over and see whether *I think* there is any grounds to go ahead * * * I am holding this case for dismissal. *I think* there has been a great deal of laches and lack of diligence upon the part of plaintiffs to ever want to try this case * * * As I say, *I think* I am going to dismiss this case, but I want to know what you have in mind * * * *I think* you have been out of court for several years myself." (R. 162-164).

Obviously, the phrase "I think" is used by the trial court in expressing tentative views for the enlightenment of counsel and the stimulation of discussion and not for the purpose of making positive and definitive rulings.

In a formal order denying motions and dismissing cause dated July 31, 1950, the court below set forth its "Findings as to Prosecution of the Case" (R. 177-185). These findings are uncontroverted and clearly support the Order of Dismissal.

2. The Total Lapse of Unexcused Time Is Sufficient to Demonstrate Lack of Diligence.

The complaint was filed on December 7, 1945. Four years and twelve days later Appellants filed their motions for judgment and for leave to file a further supplemental complaint (R. 143-144).

Certain of the intervening delays are excusable. From the date of commencement (December 7, 1945) until the date the stipulation was rejected (December 20, 1946), the case was either actively prosecuted or under submission. Thus, a period of one year and two weeks is excluded so far as delay is concerned.

With respect to delays attributable to Appellee, Appellants refer to "the repeated extensions of time requested by defendant" and say that "delays for the next ten months were due to requests by defendant for extensions of time and its delay in filing an amended answer" (Brief pp. 57-58), the latter reference apparently being to the period following December 20, 1946. Appellants are overly generous in crediting Appellee with time consumption. Appellee procured extensions in connection with (1) interrogatories of Appellants and (2) the filing of an amended answer (see "Findings as to Prosecution of the Case," R. 177-185, and Docket Entries, R. 193-197). Appellants filed interrogatories on February 3, 1947, and Appellee's time to answer or object thereto was extended from February 14 to April 8,

1947, a period of less than two months. Oddly enough, on the filing of Appellee's objections, the interrogatories were withdrawn and the case became dormant. Then, from August 4 to September 22, 1947, a period of one month and a half, Appellee was granted time to file an amended answer; and the case soon went back to sleep again. While it is thus apparent that the extensions granted Appellee interrupted rather than induced the somnolence, Appellee does not resist being charged with the actual extent of these delays, totalling three months and one week.

Combining the original year and two weeks of activity with extensions granted Appellee, the result is that Appellants definitely cannot be charged with responsibility for one year, three months and three weeks of the total period of over four years. But what of the remainder?

The period from January 28, 1948, to February 14, 1949, involves the delay resulting while the *Potter* case was in the process of appeal to and consideration by this Court. The record is clear that this delay was by mutual consent of counsel for both Appellants and Appellee, and the latter recognize their participation in and co-responsibility for the delay. But here the question is whether in the eyes of the trial judge the delay was excusable and whether he was bound to recognize the arrangement of convenience that the parties had entered into; and it is pertinent to observe that such arrangement was not called to the trial court's attention until December 19, 1949 (R. 153), months after this particular delay had occurred.

Even if this period be considered excused, the total excused periods amount to two years and four months, leaving a period of at least one year and eight months un-

explained and unexcused. In *United States v. Bernstein,* 166 F.2d 466 (C.C.A. 5th 1948), a dismissal after a delay of one year and four months was held not to constitute an abuse of discretion.

Appellants seek refuge in a local practice of calling court calendars, in the absence of a particular judge, and in the inactivity of Appellee. This is an attempt to shift the burden of prosecution to the court or to the defendant. The burden rests squarely on the plaintiff in a cause at every stage of the proceedings diligently to prosecute his action. The burden cannot be shifted. Appellants have failed to sustain their burden. *Hicks v. Bekins Moving & Storage Co., supra,* p. 43.

3. Additional Factors Lend Further Support to the Propriety of the District Court's Dismissal for Want of Prosecution.

Appellants seek to distinguish the cases relied upon by the court below because the *facts* differed. Factual similarity is not a sine qua non of persuasive and controlling precedent. In rulings within the discretion of a court, the facts and circumstances of each particular case must be examined. There are factors over and above a merely temporal measure of lack of diligence which support the ruling of the court below.

Appellants were undecided as to what course to pursue and unwilling to proceed with a trial on the merits. On December 20, 1946, the court rejected the stipulation. Two avenues were then open to Appellants: (1) submit to a judgment of dismissal and then appeal therefrom, or (2) proceed with a trial on the merits. The court below would have permitted either (R. 128-129). First Appellants apparently elected to try the cause, for interrogatories were

filed on February 3, 1947, but they were withdrawn on May 19, 1947, after objections thereto were filed and after the enactment of the Portal-to-Portal Act (R. 149-150, 181-182, 195). *No further move was ever made toward a trial on the merits.* On September 22, 1947, the amended answer was filed and the setting for pre-trial conference, after several postponements, was indefinitely postponed on November 18, 1947.

Thereafter, Appellants were totally inactive (part of the time awaiting the *Potter* decision) until the court on November 28, 1949—two years later—set the case for call on December 5, 1949. At that December 5 hearing, counsel for Appellants said:

> "I think that quite likely, in view of those facts [the refusal to approve the settlement and the *Potter* decision], the plaintiffs will not desire to press the matter further. However, this case is Mr. Mowry's, with whom we are associated, and although I have discussed the matter with Mr. Mowry I do not have at this time authority so to advise the Court. So I would suggest, if it is agreeable to the Court, that the matter be continued on call for one week, at which time I would hope to have discussed the matter further with Mr. Mowry and be in a position to advise the Court definitely of the plaintiffs' position as to whether or not plaintiffs will want to continue this matter any further or make any further attempt to prosecute the case." (R. 191-192).

Then at the December 12 hearing, Appellants requested an additional week "in which to further plead or to file a motion, perhaps, for leave to file a supplemental complaint in the case" (R. 161). The resultant pleadings constituted

nothing more than the resubmission of matters already decided against the Appellants (correctly, as we have demonstrated) and in no wise constituted a willingness to try the case on the merits.

Unwillingness to proceed with the trial of a cause is an omen of lack of diligence. *Partridge v. St. Louis Joint Stock Land Bank, supra,* p. 44. The flurry of motions stirred up by the trial court's prophetic warning cannot exculpate the Appellants. They could have been made much sooner. Appellants admit the court "could have tried this case a good many years ago * * *" (R. 163). "* * * Subsequent diligence is no excuse for past negligence * * *." *Hicks v. Bekins Moving & Storage Co., supra,* at page 409 of 115 F.2d.

As hereinbefore noted (*supra,* pp. 30-32), the enactment of the Portal-to-Portal Act of 1947 caused a fatal weakness in Appellants' claims. The complaint and [first] supplemental complaint no longer stated a claim upon which relief could be granted. The District Court was thereupon deprived of jurisdiction. A duty immediately arose in Appellants to amend so that the necessary jurisdictional allegations appeared on the Record. No such amendment has ever been made or tendered. The burden so to do clearly rests on Appellants. *Bumpus v. Remington Arms Co., Inc., supra,* p. 36. The failure to sustain this burden is further evidence of lack of diligence.

It has also been shown above (*supra,* pp. 32-37) that Appellants no longer have a meritorious claim, assuming they once did, as a result of the Portal-to-Portal Act, the failure to amend, the decision in the *Potter* case, and the studied avoidance of a trial on the merits. The non-existence of a meritorious claim is of added weight in favor of

the propriety of a dismissal for want of prosecution. *United States v. Pacific Fruit & Produce Co., supra,* p. 44; *Partridge v. St. Louis Joint Stock Land Bank, supra,* p. 44.

On this record, the findings of the court below with respect to the prosecution of this case cannot be impeached. They clearly support the Order of Dismissal for Want of Prosecution. There is no showing of abuse of discretion. The Order should be affirmed.

CONCLUSION

It appearing from the foregoing discussion that the orders of the trial court were within its powers and its discretion, and no abuse of discretion appearing from the record, the orders appealed from should be affirmed.

Respectfully submitted,

GORDON JOHNSON
RICHARD DEVERS
DARIO DE BENEDICTIS
Attorneys for Appellee.

THELEN, MARRIN, JOHNSON & BRIDGES
HART, SPENCER, MCCULLOCH,
ROCKWOOD & DAVIES
Of Counsel for Appellee.